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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF ALABAMA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-captioned case.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama (Appendix A, *infra*, pp. 12–30) is reported at 171 F. Supp. 720. The opinion of the Court of Appeals (Appendix B, *infra*, pp. 31–41) is reported at 267 F. 2d 808.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, p. 41) was entered on June 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

had perpetuated a great disparity between the respective percentages of white and Negro citizens of voting age registered to vote in Macon County, Alabama, in favor of the former, despite the fact that Negro citizens of voting age in Macon County greatly outnumber white citizens of voting age (R. 3). The complaint sought a declaratory judgment of the illegality of the specified acts and practices and an injunction to prevent future discrimination (R. 7–8).

On February 23, 1959, the complaint was amended to include the State of Alabama as a party defendant. It was alleged that the State, through its agents, officials and agencies, had engaged in discriminatory and unlawful practices restricting the right of Negroes to register and to vote. The amendment sought a judgment declaring that these acts and practices were illegal and "enjoining Defendant State of Alabama from engaging in such illegal acts and practices in the future and from interfering with the performance of such acts and practices as may be required by the Constitution and laws of the United States and the decree of this Court" (R. 70–71).

Motions to dismiss were filed (R. 65–68, 120–130), and granted as to all defendants (R. 139). The District Court held that the action did not lie against the State of Alabama because the Civil Rights Act of 1957 did not authorize suits against States as such (App. A, *infra*, pp. 28–29). It held further that the individuals sued, Rogers and Livingston, could not be made defendants because they had resigned prior to the institution of the action (App. A, *infra*, pp. 16–22), and that the Board of Registrars was neither a suable

entity under Alabama law nor a "person" subject to suit within the meaning of the Civil Rights Act (App. A, *infra*, pp. 22–25). The Court of Appeals affirmed (App. B, *infra*, pp. 31–41).

REASONS FOR GRANTING THE WRIT

The principal question presented for review is whether, assuming that (1) the individual Board members who were sued had effectively resigned prior to institution of this action and (2) the Board of Registrars is not a legal or suable entity, the Civil Rights Act of 1957 authorizes, in such circumstances, the grant of injunctive relief against a State.[2] This question is one of first impression.[3] As is apparent, it is also a

[2] This Court has frequently held that, save in exceptional circumstances, it will not review questions of state law which have been determined by the lower federal courts in the area. See, *e.g.*, *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525, 529–30; *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530, 534; *Huddleston* v. *Dwyer*, 322 U.S. 232, 237. The District Court and the Court of Appeals have here held, without relying on any precise holdings by the Supreme Court of Alabama, that under the applicable Alabama statutes (1) the individual Board members had effectively resigned and (2) the Board is not a suable entity. In view of the general rule of review declared by this Court in the cases cited, the Government will assume *arguendo*, for purposes of this petition, the correctness of these rulings as to state law, unless the Court should deem that there here exist exceptional circumstances warranting review of those issues. We wish specifically to reserve, however, the right to argue, in the event that certiorari is granted, that the registrars, despite their "resignations", remained under a *federal* duty to redress, so far as within their power, the discriminations against federal constitutional rights for which they were responsible.

[3] It is, of course, clear that a State has no general immunity from suit by the United States. *United States* v. *Texas*, 143 U.S. 621; *United States* v. *California*, 332 U.S. 19.

question of vital and fundamental importance to the future administration of the Civil Rights Act. Indeed, this case dramatically illustrates the proposition that, if a State is not amenable to the Act, the statutory objectives may be thwarted. Thus, as soon as there is an inkling that a federal investigation is afoot, registrars may resign. (The individual defendants sued in this case, Rogers and Livingston, resigned following institution of an investigation of their acts and practices by the Commission on Civil Rights (App. A, *infra*, pp. 15–16).)[4] Other state officials may leave the vacancies unfilled for indefinite periods. (The vacancies in Macon County have not been filled since the resignation of Rogers and Livingston, and the Board has now been inoperative for some nine months.)

On the other hand, if the State may be sued there can be no doubt that equity has ample and appropriate powers to require the State (if necessary, through its highest officials, as well as its local officers) to take affirmative steps to remove those discriminations which have been imposed in the past and to give effect to the right to vote—a right which the State itself is forbidden by the Constitution of the United States to deny or abridge.[5]

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[4] The technique of resignation by Board members has been used to thwart registration by Negroes as well as to frustrate federal investigation or action. See complaint, para. 12, R. 4. And see Report of the United States Commission on Civil Rights, 1959, pp. 75–76.

[5] As to equity's capacity to require appropriate affirmative measures, see *Brown* v. *Board of Education*, 349 U.S 294, 300; *Terry* v. *Adams*, 345 U.S. 461, 470.

In our view, the courts below have incorrectly decided the important issue of the State's amenability to suit. We point out, *first,* that the statutory language does not preclude a suit against the State and that the question whether such an action is authorized must accordingly be answered by reference to the purposes and history which animate the legislation. We urge, *secondly,* that a study of the background and environment of the Civil Rights Act convincingly demonstrates that it was designed to give full implementation to the command of the Fifteenth Amendment—a command addressed to the States—and (in the words of the relevant House Report)[6] to "preserve this fundamental and basic right [to vote] *against any and all unlawful interference*" (emphasis added). Equity, we submit, is not powerless to grant in this ca[se] the only kind of relief which could be effective here—relief against the State itself—and to terminate by that avenue the long-standing denial of the constitutional rights of Negro citizens.[7]

(1) The Civil Rights Act (*supra,* pp. 2–3) authorizes the Attorney General of the United States to institute "a civil action or other proper proceeding for preventive relief" whenever "any person has engaged or there are reasonable grounds to believe that any person is about to engage" in certain acts or practices. The courts below were of the view that, since the statute comes into play when designated

[6] H. Rep. No. 291, 85th Cong., 1st Sess., p. 13.

[7] The fact that Negro citizens of Macon County have been persistently denied the right to vote for many years must be taken as established in the present posture of this litigation.

acts or practices are committed by "persons", an injunction may not issue against a State. The statute, however, does not impose any such limitation upon the grant of relief. It does not specify that preventive relief shall be directed only to natural persons or to any other designated class, and we submit that the remedial provisions should be liberally, rather than restrictively, interpreted to the end that relief shall be adequate to the needs of the case.

Even if the tatutory reference to action or threatened action by "any person" were read into the provision authorizing preventive relief, it would be an open question whether the term "person" should be taken to include a State. As this Court stated only last term, "[w]hether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment";[8] political bodies will be deemed within its coverage if "this result would best effectuate congressional policies * * *".[9]

(2) The relevant history begins with the Fifteenth Amendment which prohibits infringement of the right to vote "by the United States or by any State" (Section 1) and delegates to Congress to "power to enforce this article by appropriate legislation" (Section 2). We deal here with a provision of the Constitution which secures individual rights against *state action*[10] and with implementing legislation which un-

[8] *Sims* v. *United States*, 359 U.S. 108, 112.

[9] *Plumbers' Union* v. *Door County*, 359 U.S. 354, 358.

[10] See *James* v. *Bowman*, 190 U.S. 127; *Terry* v. *Adams*, 345 U.S. 461.

dertakes to afford those rights additional protection by providing for suit by the Attorney General of the United States as well as by private individuals.[11] It would be anomalous if such legislation were to founder because it does not in terms speak of suit against a State.

Far from justifying such a result, the history of the struggle over civil rights legislation in the 85th Congress leads one fairly to the conclusion that, so far as the right to vote was concerned, Congress undertook to provide the most comprehensive protection. Without undertaking an elaborate discussion at this stage, we advert briefly to the following significant items:

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[11] The authority for the institution of private actions, which derives from the Act of April 20, 1871 (17 Stat. 13), is found in 42 U.S.C. 1983, which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The court below, presumably referring to this Section, observed (App. B, *infra*, p. 36) that "civil rights legislation in general" does not authorize the grant of relief against a State. But this argument not only overlooks the difference in language between 42 U.S.C. 1983 and the provision here under review (which imposes no qualification as to the objects of preventive relief); it also ignores the crucial consideration that statutes authorizing private actions could not be interpreted, in view of the bar imposed by the Eleventh Amendment, as authorizing suits against a State.

Former Attorney General Brownell, speaking as the representative of the Executive, described the provisions in question "as machinery to enforce whatever the constitutional authority of the Federal Government may be in this area" (Hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., p. 25).

The position of the Congress is summed up in the pertinent House Report (H. Rep. No. 291, 85th Cong., 1st Sess., pp. 12–13) as follows:

> The right of franchise must be protected by the sovereign if representative government is to be maintained. Therefore, the sovereign, acting within its constitutional jurisdiction, must preserve this fundamental and basic right against any and all unlawful interference. That the proposal of this section does that very thing is clear.[12]

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[12] Opponents of the legislation also understood that the proposal was a broad one which would comprehend actions against a State. Thus, Attorney General Patterson of Mississippi characterized the bill as giving the Attorney General of the United States the authority to secure "an injunction against the people of the whole State." He also observed that "such broad and sweeping authority conferred upon the Department of Justice * * * can be exercised and brought to bear upon the States of New York and California as well as upon the people of Mississippi and Georgia." See Hearings of Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Sess., p. 753. See also statement of Honorable Robert E. Jones of Alabama, *id.* at 796. Mr. Davis Grant, Assistant Attorney General of Texas, commented: "Thus you could have the State pitted against the Federal Government. This would most certainly result in a sharper conflict than an action against a private individual ever would." Hearings of the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the United States Senate, 85th Cong., 1st Sess., p. 448.

CONCLUSION

The District Judge who decided this case fully recognized that there are circumstances in which suit against a State is not only "appropriate" but "necessary" if the Attorney General is to have "full and complete authority * * * to enforce the constitutional rights here involved" (App. A, *infra*, p. 28). Whether Congress has conferred such authority by its enactment of the Civil Rights Act of 1957 is a question of national importance which should be resolved by decision of this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1959.

APPENDIX A

In the District Court of the United States for the Middle District of Alabama, Eastern Division

Civil Action No. 479–E

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALABAMA; THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS, DEFENDANTS

MEMORANDUM OPINION

This is an action by the United States, as plaintiff, against Grady Rogers and E. P. Livingston—each as a member of the Board of Registrars of Macon County, Alabama—The Board of Registrars of Macon County, Alabama, and the State of Alabama, as defendants.

The action is brought under Part IV of the Civil Rights Act of 1957 (P.L. 85–315, 42 U.S.C.A. 1971 (c)) [1] to obtain preventive relief against acts and prac-

[1] § 1971(c): "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

tices by the named defendants which deprive other persons of rights and privileges secured by § 1971(a) of Title 42, U.S.C.A., namely, the right and privilege of citizens of the United States, who are otherwise qualified by law to vote at any election by the people in the State of Alabama, to be entitled and allowed to vote at all such elections without distinction of race or color.

The plaintiff says that each of the named defendants, being under a constitutional obligation to fulfill certain duties and obligations relative to registering qualified applicants of Macon County, Alabama, to vote without regard to considerations of race or color, has for many years, persisted in acts and practices in violation of this constitutional obligation, which acts and practices have resulted in depriving qualified citizens of their right to vote solely because of their race and color.

Originally the action did not include the State of Alabama as a defendant. However, the action was, pursuant to the provisions of Rule 15 of the Federal Rules of Civil Procedure, amended on February 23, 1959, to add as an additional party defendant the State of Alabama.

Plaintiff details the "acts and practices" the defendants are alleged to engage in violation of their constitutional obligations and seeks to have this Court adjudge those acts and practices to be in violation of the constitution and laws of the United States and to declare that said defendants are under a legal duty not to engage in, or permit its agents, officials and agencies to engage in such practices. Plaintiff also seeks to have this Court permanently enjoin the named defendants, or any of the defendants' agents, officials, and/or agencies from engaging in said acts and practices.

On February 12, 1959, the plaintiff, by appropriate

motion and supporting documents, moved this Court for an order directing the defendants to produce and permit the inspection, copying, and photographing of certain records, documents, and papers. This Court, upon proper application, issued on February 12, 1959, a temporary restraining order pending disposition of said motion to produce, restraining the defendants and/or their agents from destroying or otherwise rendering unavailable certain voting and registration records and other enumerated documents made and received by the Macon County, Alabama, Board of Registrars since January 1, 1954. The motion to produce, the order that was entered upon the motion to produce, and the temporary restraining order were amended on February 23, 1959, to include defendant State of Alabama.

The defendants Rogers, Livingston, and The Board of Registrars of Macon County, Alabama, separately and severally (1) move to dismiss the action as to each of them (amended February 23, 1959); (2) move to "strike and quash" the service upon each of them of the various papers in this cause; (3) object to plaintiff's motion to produce; and (4) move to dissolve as to each of them the temporary restraining order issued by this Court on February 12, 1959. The defendant State of Alabama also moves to dismiss the action as to it.

All of said defendants' motions and objections are now submitted to the Court upon the pleadings, certain affidavits and documents attached thereto, evidence by deposition, written briefs of all parties, and oral arguments of counsel.

Considering first the defendants Rogers, Livingston, and The Board of Registrars' amended motion to dismiss, with the supporting affidavits of the defendants Rogers and Livingston, it appears that said motion

cites some sixteen grounds in support thereof. The grounds fall into four general categories. They are: (1) The State of Alabama is an indispensable party; (2) the action is precluded by the Eleventh Amendment to the Constitution of the United States; (3) no relief can be had against defendants Rogers and Livingston because they had resigned; and (4) the Civil Rights Act of 1957 authorizes suits only against individual persons.

Because of the conclusions hereinafter reached by this Court, it will not be necessary in connection with the motions of Rogers, Livingston, and The Board of Registrars, to discuss or decide the questions involved in the first two categories.

Proceeding then to the third category of points (i.e., no preventive relief should be granted against Livingston and Rogers because they had resigned as registrars), the evidence presented—in the form of uncontroverted affidavits—shows that the members of the Board of Registrars of Macon County, Alabama, prior to December 10, 1958, were Grady Rogers and E. P. Livingston, the third member having died.[2] On December 10, 1958,[3] Livingston and Rogers each tendered to the appointing authority[4] a written resignation as a member of the Board of Registrars of Macon County, Alabama. Said resignations were submitted during a controversy between the Commission on Civil Rights and certain Alabama officials,

[2] In Alabama, registration of voters in each county is conducted by "a board of three reputable and suitable persons * * *" Title 17, § 21, 1940 Code of Alabama, as amended.

[3] Approximately two months before this case was filed.

[4] Appointing authority in Alabama is vested in the governor, auditor and commissioner of agriculture and industries, or by a majority of them acting as a board of appointment. See Title 17, § 21, 1940 Code of Alabama, as amended.

including Livingston and Rogers, over the right of said Commission to inspect and copy some of the same records the plaintiff in this case now seeks.[5] Both Rogers and Livingston now say that said resignations were absolute and unconditional; that they were made in good faith, and that neither intends to serve again as a member of the Board of Registrars; that said resignations have been accepted by the appointing board, and that each of them has qualified and begun serving in two other public offices.[6] Both Livingston and Rogers testify that all of the records now sought by the plaintiff were turned over to the sheriff of Macon County, Alabama, by them on December 8, 1958; that such action by them was in response to a *subpoena duces tecum* issued at the instance of Tom F. Young, Circuit Solicitor of the Fifth Judicial Circuit of Alabama. Solicitor Young testifies by deposition in this cause and the effect of his testimony is to substantiate that part of Livingston's and Rogers' testimony. Solicitor Young unequivocally states that he now has the custody of said records and that said records are in a locked room in the courthouse of Macon County, Alabama.

The Defendants Livingston and Rogers:

The matter is therefore focused as to Livingston and Rogers. If, as they contend, their resignations were effective in all respects, they cannot now be sued

[5] In Civil Action No. 1487-N, styled in re: George C. Wallace, et al., this court on January 5, 1959, ordered these same two defendants to make said records available; said order was complied with, and both Livingston and Rogers were dismissed from said action.

[6] Rogers was in May, 1958, nominated for and in November, 1958, elected to the Alabama House of Representatives; he was sworn in and commenced serving as such official in January, 1959. Livingston was appointed to be a jury commissioner for Macon County sometime after this suit was filed.

in their capacity as registrars of Macon County, Alabama.[7]

If, however, as the plaintiff contends, they have the continuing obligations of their office as registrars of Macon County, Alabama, until their successors are appointed,[8] they are proper parties to this action.

The statute prescribing the terms of office for the registrars in Alabama, designated as § 22 of Title 17, 1940 Code of Alabama, as amended, is as follows:

> § 22. *Terms of office.*—The registrars so appointed under this article may be removed at the will of the appointing board, or a majority of the members thereof, at any time, with or without cause, and without giving their reasons therefor; and if not so removed, the registrars may hold office for four years from the time of their appointment and until their successors are appointed.

The plaintiff reasons that the word "may" as used in this statute is to be construed to mean "shall" wherever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers. Such a theory is not without supporting authority—even in Alabama. See *Montgomery* v. *Henry*, 144 Ala. 629 (1905).[9]

However, the real question here is: What did the Legislature of Alabama intend? There are no cases directly in point. In making an effort to resolve this question it is significant to note that Alabama has a

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[7] This Court does not understand that Livingston and Rogers are sued in any capacity other than as members of the Board of Registrars: their appearance in this cause as "individuals" was unnecessary.

[8] No successors have yet been appointed.

[9] Also see *Wilson* v. *United States*, 135 F. 2d 1005; *Vason* v. *City of Augusta*, 38 Ga. 542; and *People* v. *Turnbull*, 184 Ill. App. 151.

general statute relating to terms of office. This general statute, designated as Title 41, § 176, 1940 Code of Alabama, as amended, reads as follows:

> *Vacancies in State and County offices; how filled; term of office.*—Vacancies in all state and county offices are filled by appointment of the governor, except as otherwise provided; the appointees must be commissioned, and they shall hold their offices for the unexpired term, and until their successors are elected and qualified.

It can very readily be seen that § 176 of Title 41 is not applicable to the registrars because of that portion of § 176 that says "except as otherwise provided"; this is true since it is "otherwise provided" in § 22 of Title 17, supra. Thus, insofar as the term of office for registrars is concerned, § 22 of Title 17 is generally controlling.

This Court is of the opinion that had the Legislature of the State of Alabama intended for the registrars to remain obligated to serve until their successors were appointed and qualified they would not have used the permissive term "may" but would have used the imperative term "shall" as they did in the general statute, supra.

In *Badger, et al.* v. *U.S. Ex Rel Bolles,* (1876), 93 U.S. 599, which case is heavily relied upon by the plaintiff, the Supreme Court had before it for interpretation a statute of the State of Illinois, the pertinent part of that statute being "they shall hold their offices until their successors shall be qualified." The question there before the court was whether or not certain officers, to-wit, a supervisor, town clerk, or justice of the peace, could resign their offices and thereby be relieved of their duties and responsibilities prior to the time their successor was appointed or chosen and was qualified. Mr. Justice Hunt, deliver-